*February* 24. 1767.

# ANSWERS

FOR

JAMES LOWRIE Reſidenter in *Edinburgh*;

TO

The PETITION of *David Wardrop* Merchant in *Edinburgh.*

94

THE *libel*, on which the reſpondent is purſued, ſets forth, in the following *terms*, That he *granted a promiſſory note, in favour of William Bell, whereof the tenor follows.* " London, 7th No- " vember 1765, *L.* 15. Six months after date, I pro- " miſe to pay Mr William Bell, or order, *L.* 15 Sterling, " value received. (*Signed*) James Lowrie." *Below thus,* " At Mr William Elliot's writer, Edinburgh :" And the defences, the reſpondent has againſt payment, will appear from the following facts.

The reſpondent, by birth a Scotchman, left his native country about ſeven years ago, purpoſing to go over to America, and do ſomething for himſelf in that country; for which he took ſhipping in 1759; and it cannot be pretended that he either owed William Bell *a farthing*, on *any* account, at the time he took his paſſage that year, or has had *any* tranſactions with him ſince that time, *other* than *the one* which gives riſe to the preſent queſtion.

The reſpondent, after continuing about ſix years in America, was obliged to return to Britain; and the ſhip, in which he took his paſſage, happening to be bound for England, it was owing to that accident that he was at all in London in 1765; and he determined to ſtay there no longer than he ſhould find an opportunity of returning to Scotland, which caſt up in a few days.

It is therefore a miſtake, to call the reſpondent a *reſident-er* in London; and as he was not engaged in *any* buſineſs during the *ſhort* time he was *obliged* to ſtay in that city, any note which he could then grant, cannot properly be ſaid to have been *in re mercatoria*.

It happened however, during theſe few days, that he fell into company with William Bell, mentioned in the petition, who, the reſpondent will honeſtly confeſs, after drinking him hard, prevailed upon him to grant, of this
Nov. 7. 1765. date, as he believes, *three* promiſſory notes, one for *L.* 10, payable three months, another for *L.* 15, payable ſix months, and a third alſo for *L.* 15, payable nine months after date; for which he did not get *any* value, other than the bill for *L.* 40 drawn on Mr Armſtrong.

But this bill was plainly an impoſition, as Mr Armſtrong had no effects belonging to William Bell in his hands, and therefore refuſed to accept the draught, as ſoon as it was *preſented* to him, which was in fact done on the 7th February 1766, as would appear from a letter the reſpondent wrote Bell the very next day, informing him of the diſhonour. The bill, it is true, was not *proteſted* for ſome months after, *viz.* till the 8th of July 1766, becauſe the reſpondent did not imagine William Bell would ever, in theſe circumſtances, have the hardineſs to demand payment of the note; and it was not till the preſent ſummons was ſerved upon him, at the petitioner's inſtance, that a proteſt was taken, which was neceſſary for proving the diſhonour,

honour, and thereby putting himſelf in a condition to meet the claim now made upon him.

From theſe facts, the defence is obvious. *Imo*, The promiſſory note is not produced; and though the reſpondent has candidly acknowledged he granted not only one, but three to Bell, yet he cannot admit its tenor; and Bell is averred, as well as acknowledged in the libel, to have indorſed it over, by a ſeries of indorſements, of which the reſpondent can ſafely ſay he knows nothing: nor can he be ſuppoſed to do it, as he left London immediately after granting the note; and there is not the leaſt evidence of any of the three indorſations, here alledged to have been made from William Bell to Thomas Bell, from Thomas Bell to George Forbes, and from George Forbes to the petitioner.

It is indeed ſaid in the petition, (p. 9.) " By the defen-
" der's acknowledgment that he actually *granted* the note
" libelled on by the petitioner, it ſeems to be plain, that
" he has *alſo acknowledged the progreſs* by indorſation."

But it is ſubmitted, that the concluſion does clearly not follow; as the acknowledging the *granting of a note*, and the acknowledging a *progreſs of indorſees*, long or ſhort, through whom it has paſſed by indorſation, are things totally different and unconnected with one another; and it is certain that, in *moſt* caſes, the perſon who ſigns a note never ſees it till payment is demanded, ſo that he can ſeldom know any thing about the indorſees.

And the reaſon aſſigned in the petition, (p. 9.) to prove the juſtneſs of the concluſion, is equally erroneous, which is, that " without this, it is *impoſſible to figure*, how, or in
" what manner the petitioner could get the note into his
" *poſſeſſion*," as one may a thouſand ways get into his *poſſeſſion* a note not indorſed to him; and it will be more particularly obſerved hereafter, that the letter produced from Mr Forbes, in which the note is ſaid to have been inclo[ſ]ed,

incloſed, does not even prove that it was indorſed to the petitioner.

Another obſervation, of which it is not eaſy to ſee the propriety or force, is alſo made by the petitioner, who ſays (p. 9). "It is in *no* caſe neceſſary to the ſatisfaction "of the debtor, that the *poſſeſſor* of a bill of exchange, or "of a promiſſory note, ſhould *inſtruct the progreſs by indor-* "*ſation.* Simple *poſſeſſion* of the bill or note is ſufficient to "*oblige* the debtor to the payment, even though none of "the indorſations be filled up, as often happens, except "he can ſay and prove, that he never gave any ſuch ſecu- "rity, and that it is a forgery." For, 1*mo*, In thoſe caſes in which a bill or note is *produced*, it is not neceſſary otherwiſe to inſtruct its progreſs, as that appears *ex facie* of the writ itſelf; but, in the preſent caſe, the note is not produced, and the reſpondent has not ſeen it ſince it was firſt granted. 2*do* No perſon can, in any caſe, demand payment of any note or other debt, unleſs he proves his right, either by the writ itſelf and an aſſignment, or by the note or bill produced, with an indorſement appearing upon it; and it is a doctrine extremely new to maintain, that *any* perſon, who happens to be *poſſeſſed* of a note, is thereby intitled, be he indorſee or not, to compel the debtor to pay.

It appears therefore, in the *firſt* place, That the petitioner has no right or title to demand payment of this money: But, in the *ſecond*, if the note itſelf were produced, with the pretended indorſations appearing upon it, action could not be ſuſtained for payment of the contents, on account of the nature of the document on which the claim is founded.

And here it is almoſt needleſs to enter upon the queſtion, Whether promiſſory notes, *truly* granted in *re mercatoria*, are intitled to the privileges of bills of exchange? It may only be ſhortly obſerved, 1*mo*, That in countries, in which

which trade has been carried to the greateſt height, theſe privileges are confined to bills of exchange; which is indeed plain from hence, that they have been generally conferred on *bills* at *common* law, in all countries: Whereas it is in England alone that promiſſory notes are allowed them; and that was introduced by ſtatute, as well as intended to take place in England only. 2*do*, Every merchant is acquainted with bills of exchange and *their* privileges, and ſuch as intend the ſecurities taken by them ſhall enjoy thoſe privileges, muſt and do make uſe of thoſe writs to which alone they are given by law. Nor is there the leaſt reaſon for extending theſe extraordinary privileges, admitted to be dangerous even in the caſe of bills, on account of the eaſy road they open to the committing of forgery, to *more* writs than are allowed them by the common uſage and law-merchant, or are abſolutely neceſſary for the purpoſes of commerce.

But, in the preſent caſe, the general point is altogether out of the queſtion, for three reaſons: 1*mo*, Becauſe the note was not proteſted or negociated, and has loſt its privileges by lapſe of time; by which means compenſation is now, at any rate, pleadable againſt the indorſee, even upon the debt of the original creditor: 2*do*, The note itſelf is not produced; and it ſeems extraordinary to inſiſt that theſe privileges ſhould be allowed to a promiſſory note, which is ſaid *not to exiſt*, more than to *any other* debt, like an open accompt, for which an ordinary action is obliged to be raiſed: And, 3*tio*, The note here ſaid to have been granted, was not an Engliſh, but a *Scotch* one, granted between Scotch perſons, and payable in Scotland; and it is indiſputable, that theſe notes are not intitled, by the law of Scotland, to the privileges of bills of exchange. It ſeems therefore unneceſſary to anſwer particularly the learned arguments uſed in the petition on this point, (p. 4. and 5.), becauſe every one of them would *equally* apply to

 aſſignees

aſſignees of bonds, and all *other* debts, as well as indorſees of bills of exchange and promiſſory notes; and the reſpondent ſubmits it to be a point *ſettled* in the law of Scotland, on *ſolid* principles, that compenſation does not, among us, operate *ipſo jure*, or produce an extinction of the mutual debts, *merely* by their concourſe, *uſque ad concurrentem ſummam*.

The petitioner, aware of the conſequence of the fact he had all along admitted, " That the promiſſory note was a " Scotch note, originally made and intended to be paya- " ble in Scotland," would now eat in that averment. But, 1*mo*, Your Lordſhips will be ſatisfied of the fact, from the *tenor*, *above recited*, given the note in the petitioner's own libel: 2*do*, In Mr Forbes's letter *produced*, it is deſcribed to be payable at Mr Elliot's: 3*tio*, The petitioner owns he has admitted the fact in his firſt repreſentation; but would now pretend that proceeded from a miſtake or inaccuracy, which cannot be ſuppoſed *in the preſent caſe*: And, 4*to*, The circumſtances above mentioned ſhow the fact muſt neceſſarily have ſtood as the petitioner *firſt* told it: For at the time the note is ſaid to have been granted, the reſpondent was not, as is pretended in the petition, a *reſidenter* in London, but only ſtaying there a few days, after landing from America, till he ſhould find an opportunity of tranſporting himſelf to Scotland; and as he not only *intended* to return to Scotland, but did actually embrace the firſt opportunity of doing it, *res ipſa loquitur*, that the note muſt have born to be payable in this country.

Nor is there any force in the obſervation, that the preſent note is drawn after the Engliſh form. For, 1*mo*, Its preciſe tenor is not either known or proved; 2*do*, It is not materially different in ſtyle from other promiſſory notes drawn in Scotland; and 3*tio*, It is a fact well known, that bankers, into whoſe hands money is put by private perſons, are in uſe to grant, not bills of exchange, but promiſſory notes,

notes, drawn preciſely after the tenor of the one libelled, for this *only* reaſon, becauſe they know ſuch notes are not not intitled to the privileges of bills of exchange, which is *real* evidence of the way in which they hold the law-merchant to ſtand on this point.

As therefore this promiſſory note is not intitled to the privileges of a bill of exchange, compenſation muſt be pleadable againſt it on the diſhonoured bill produced, drawn by Bell. Nor can the reſpondent be ſecured or benefited by any recourſe he can have upon Bell, or the abſolute warrandice offered by the petitioner. For if the note is intitled to the privileges of a bill of exchange, and was indorſed blank by Forbes, as is admitted in the petition, it may have fallen into improper hands, and its indorſation may, in many ways, be filled up in favour of an indorſee, different from the petitioner, who, on producing it, would undoubtedly, on the petitioner's own argument, have a better action than he now has, and might again compel payment, after it had already been made. Nor is the reſpondent obliged to truſt to the ſecurity offered him; and his recourſe on Bell would not avail: but if it can be had, it lies equally to the petitioner with the reſpondent, who would, on his own argument, get his reimburſement in England; and as he has been in the fault, it is more reaſonable he ſhould be at the trouble of reſorting on his indorſations for recourſe, than the reſpondent, a ſimple, weak lad, who has plainly been impoſed on in the tranſaction.

This muſt, in the *third* place, have more weight on three accounts. 1*mo*, From the fact already ſtated, the promiſſory note appears not to have been granted, either among merchants, or *in re mercatoria*: Bell is not a merchant, and the reſpondent had no buſineſs in London; nor did any dealings paſs between them; and the reſpondent did not get the leaſt value for the note, other than Mr Armſtrong's

Armſtrong's bill, as is ſufficiently proved from the coincidence of their dates.

It is indeed ſaid, the ſums do not agree; to which it is anſwered, from the fact above acknowledged by the reſpondent, That, beſides the preſent, he was alſo induced by Bell to grant him two other notes, one for *L.* 10, payable at three, and another for *L.* 15, payable at nine months, which make up the *L.* 40; and theſe two notes, the petitioner has been informed, are at preſent lying in the hands of one Macintoſh at London.

2*do*, The indorſements here alledged, cannot be believed to have truly been made *in re mercatoria*, and the indorſees appear even to have been in the knowledge of the circumſtances in which the note was granted; or, at leaſt, did not accept of the indorſements with any reliance upon the payment: For the firſt indorſee libelled is one Thomas Bell, brother and confident of William Bell; the ſecond is George Forbes; and the idea he had of his parties, as well as of the tranſaction, appears from the following extract from the poſtſcript produced of his letter, directed to the petitioner, relating to the note. " I muſt *beg* of you to " *preſent it to Mr Elliot*, and ſee if *he* will promiſe pay- " ment of it when due, as they are *ſlippery chaps* I have to " deal with. Let *me* know your ſucceſs as ſoon as you " can."

From this it is ſufficiently apparent, that Forbes did not *abſolutely* accept of the note *for payment*, or truſt in the leaſt to it; but it was intended he ſhould, in all events, have recourſe upon thoſe who had made the indorſement in his favour: And therefore he cannot be allowed, were the note even a bill, the privileges of an *onerous indorſee*, as he has not taken it abſolutely in payment, but in *ſecurity* only.

3*tio*, The poſtſcript farther ſhows, that the note has not even been indorſed to the petitioner, but that he is no more than

than a *friend* or *agent*, employed by Forbes to recover payment, *if he could*; and therefore *utitur jure auctoris*; and he can have no privileges which Forbes had not: Nor can it be believed, that he either paid, or intended to pay value for the draught, but he muſt, at the beſt, be held a gratuitous indorſee.

It is true, an accompt is produced, in which *L.* 15 on this note is ſtated by Forbes to the petitioner's *debit*; but, 1*mo*, The accompt itſelf is not, as is inſinuated in the petition, a *fitted* accompt, ſigned and approved by both parties; it is ſigned, and the adjuſtment thereon made is docketed by Forbes *alone*; nor has the petitioner ſigned it, which ſhows he does not abſolutely allow that article of the debt to be good againſt him. 2*do*, The accompt itſelf, with the docket thereto ſubjoined, ſigned by Mr Forbes, is *only* dated at London, 15th July 1766, *pendente lite*, long *after* the commencement of the *preſent* proceſs, as well as after the reſpondent had refuſed payment; and therefore could only be *drawn out and tranſmitted* to Scotland, to be produced in this cauſe, for the purpoſe of making it believed, that the petitioner had truly paid value for the note; which, it appears, could not be the caſe. For, 3*tio*, No receipt is produced for the money, to ſhow that the *L.* 15 was actually paid by the petitioner to Forbes for the indorſement or note: On the contrary, the docket does expreſsly own the balance therein ſaid to be due, not to be *yet* paid by the petitioner; and as no value appears to have been given for the note, unleſs *the barely charging it* in the accompt can be taken for ſuch; ſo the thing ſpeaks it to be underſtood between them, that the petitioner ſhall not be chargeable for the money, unleſs he recover it, as is the caſe in all theſe tranſactions.

*In reſpect whereof*, &c.

GEO. WALLACE.